

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

RESOLUTION NO. R5-2003-0105

CLARIFICATION OF RECEIVING WATER LIMITATIONS FOR DISCHARGES FROM
IRRIGATED LANDS TO SURFACE WATERS

CONDITIONAL WAIVERS OF
WASTE DISCHARGE REQUIREMENTS
FOR
DISCHARGES FROM IRRIGATED LANDS

In July 2003, the Regional Water Quality Control Board, Central Valley Region (Water Board) adopted *Conditional Waivers of Waste Discharge Requirements for Discharges From Irrigated Lands Within the Central Valley Region* (Conditional Waivers or Waiver). The State Water Resources Control Board (State Water Board) upheld the Conditional Waivers with some revisions. Various parties filed petitions seeking writs of administrative mandamus. On 10 May 2005, the Sacramento County Superior Court issued a ruling in the matter of *Deltakeeper, et al. v. California Regional Water Quality Control Board, Central Valley Region, et al.*, Case No. 04CS00235, and *California Farm Bureau Federation, et al. v. State Water Resources Control Board, et al.*, Case No. 04CS00264 (Court Order). In that ruling, the court remanded the matter to the Water Board to clarify

“...the extent to which the Waiver is intended to apply to agricultural dominated waterways and constructed agricultural drains and other non-stream tributaries; the extent to which the Waiver purports to impose receiving water limitations upon such water bodies; and, in light of the foregoing, the extent to which the Waiver may rely on application of the Tributary Rule for these purposes.” [Ruling, at page 77]

This Attachment A2 has been prepared to clarify these issues. It was prepared pursuant to the Court Order and is intended solely as clarification of the Conditional Waivers and does not have any other regulatory effect.

1. Application of the Conditional Waivers to Agricultural Dominated Waterways and Constructed Agricultural Drains.

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) [California Water Code (CWC) Division 7] defines the “waters of the state” as “any surface water or groundwater, including saline waters, within the boundaries of the state”. (CWC § 13050(e).) Consistent with that definition, “agricultural dominated waterways” and “constructed agricultural

drains”¹ are waters of the state because they are surface waters within the boundaries of the state. The Conditional Waivers regulate discharges of waste from irrigated lands to all surface “waters of the state,” including agricultural dominated waterways and constructed agricultural drains.

2. Application of Receiving Water Limitations to Agricultural Dominated Waterways and Constructed Agricultural Drains.

The Porter-Cologne Act requires the Water Boards to adopt water quality control plans, also called Basin Plans, for each region. The Basin Plan must (1) identify the beneficial uses of the waters to be protected, (2) establish “water quality objectives” to protect those uses, and (3) establish implementation programs for achieving the objectives. In addition, the federal Clean Water Act (CWA) requires the state to adopt water quality standards that include designated uses, water quality criteria, and an anti-degradation policy for “waters of the United States.”² Where the state does not act, the federal Environmental Protection Agency (US EPA) adopts water quality standards for the state. The beneficial uses and water quality objectives in the Basin Plan, the applicable state water quality control plans and policies, and the National Toxics Rule and California Toxics rules adopted by US EPA constitute the water quality standards for “waters of the United States.” (CWC §§ 13142, 13240, 13241, 13242.) All surface waters that are “waters of the U.S.” are necessarily also “waters of the state.”

The Conditional Waivers include Receiving Water Limitations that implement the applicable water quality objectives and water quality standards for all surface waters of the state within the Central Valley Region. Because agricultural dominated waterways and constructed agricultural drains are waters of the state, the Receiving Water Limitations in the Conditional Waivers apply to them.

3. Determination of applicable beneficial uses of water bodies that receive discharges from irrigated lands, including application of the Tributary Rule.

There are many ways that beneficial uses can apply to waters of the state. The most relevant of these with regard to the Conditional Waivers are the following:

- (1) The Basin Plan designates beneficial uses of specifically listed individual water bodies and groups of water bodies, including some constructed agricultural drains.

¹ For the purposes of this waiver, a “constructed agricultural drain” is a water body that conveys drainage from agricultural operations and was constructed in a location where no natural water body (including intermittent swales, etc.) existed prior to the construction activity. Every other water body is a “stream” under the terms of the tributary rule, whether it has been modified for agricultural discharge conveyance, flood control, water supply, or other purposes or not. The Court Order also refers to “other non-stream tributaries.” The Regional Water Board is not aware of any “other non-stream tributaries” that convey agricultural drainage.

² U.S.C.A. §1362(7) (FWPCA §502(7)); 40 C.F.R. §122.2.

- The Water Board has adopted two Basin Plans: the Water Quality Control Plan for the Sacramento and San Joaquin Rivers (4th Ed. 1998) and the Water Quality Control Plan for the Tulare Lake Basin (2nd Ed. 1995).
- (2) The State Water Board can adopt statewide plans and policies for water quality control that designate beneficial uses for specific water bodies and groups of water bodies. (CWC §§13140, 13170.)
 - (3) The Basin Plan designates beneficial uses of tributary streams that are not specifically listed in the Basin Plan by reference to the named waters to which they are tributary. (This is known as the “tributary rule” and is discussed further below.)
 - (4) Beneficial uses can be attributed by operation of law. (See, e.g. 33 U.S.C.A §1251(a)(2) (FWPCA §101(a)(2). The federal CWA requires that “waters of the United States” be protected for the beneficial uses of fishing and swimming.)³
 - (5) Beneficial uses that actually exist in a water body, or have existed since at least 1975, must generally be protected even if they are not formally designated in a plan or policy. (See, e.g. State Water Board Resolution No. 68-16 (i.e., the Antidegradation Policy) and 49 C.F.R. §131.12.)

The “tributary rule” in the two Central Valley Basin Plans provides as follows:

“Existing and potential beneficial uses which currently apply to surface waters of the basins are presented in Figure II-1 and Table II-1. The beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board’s judgment will be applied. It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis.” Basin Plans, page II-2.00.

The “tributary rule” establishes beneficial uses for tributary streams that are not individually listed in the Basin Plan. The Water Board has concluded that, because of its use of the term “tributary streams,” the “tributary rule” applies only to “streams” and not to “constructed agricultural drains.” The beneficial uses of constructed agricultural drains are not, therefore, determined by the tributary rule, but by the other methods for applying beneficial uses. For example, a particular constructed agricultural drain may have existing beneficial uses, uses designated by a plan or policy, and/or fishing and swimming uses attributed by operation of law under the CWA.

³ In *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526, the court held that irrigation canals are waters of the United States if they are tributary to natural creeks.

4. Implementation of the Receiving Water Limitations in the Conditional Waivers.

The Conditional Waivers require all Dischargers to comply with the Receiving Water Limitations. Some of the Receiving Water Limitations explicitly refer to adverse impacts to beneficial uses. Those Receiving Water Limitations require a determination of the beneficial uses for the applicable receiving water bodies.

Attachment A to the Conditional Waivers lists the water quality objectives that apply to specific water bodies and those that apply to all water bodies in the Central Valley Region. As explained above, if the discharge is to a stream (i.e., any water body other than a constructed agricultural drain) that is not specifically listed, the applicable beneficial uses for that stream include those in the downstream listed water body. In addition, the other methods of determining beneficial uses described above must be considered for all water bodies. It must also be noted that the Receiving Water Limitations protect the beneficial uses of all water bodies within the Central Valley Region that ultimately receive the dischargers' waste. Therefore, regardless of the beneficial uses that apply to the water body that directly receives the waste discharge, dischargers must also ensure that their discharges do not impact the beneficial uses of any downstream water bodies.